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10 UNITED STATES DISTRICT COURT  
11 WESTERN DISTRICT OF WASHINGTON  
12 AT TACOMA

12 STEPHEN KNIGHT LEWIS,  
13  
14 Plaintiff,

15 v.

16 CITY OF LAKEWOOD *et al.*,  
17  
18 Defendants.

CASE NO. C08-5589FDB/JRC

REPORT AND  
RECOMMENDATION

Noted for September 25, 2009

19 This 42 U.S.C. §1983 Civil Rights matter has been referred to the undersigned Magistrate  
20 Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrate Judge's  
21 Rules MJR 1, MJR 3, and MJR 4. Before the court is Defendant's Motion for Summary  
22 Judgment (Dkt # 32). Plaintiff has responded (Dkt. # 41). Defendants have replied (Dkt. # 42.  
23 Having read the pleadings and considered the entire file the Court recommends that Defendant's  
24 Motion for Summary Judgment be GRANTED IN PART.  
25

26 Mr. Lewis brings this action alleging that Defendants used excessive force when arresting  
him on February 10, 2007. He also challenges a blood draw performed to determine the amount

1 of alcohol that was in his blood after his arrest. Plaintiff claims the blood draw was in violation  
2 of his Fourth Amendment rights.

### 3 FACTS

4 The following facts are undisputed and are taken from the Motion for Summary  
5 Judgment (Dkt. # 32). On February 10, 2007, Lakewood Police Officer David Butts observed a  
6 car speeding southbound on Bridgeport Way. Officer Butts was in a fully marked Lakewood  
7 City police car traveling northbound. Radar confirmed that the car he observed was traveling 50  
8 miles per hour in a 35 mile per hour speed zone. Officer Butts turned around and activated his  
9 emergency lights. The driver of the suspect's car initially appeared to pull into the Hollywood  
10 Video parking lot and then pulled back onto Mt. Tacoma Drive. The driver of the car, Plaintiff  
11 Stephen Lewis, was attempting to elude Officer Butts. Plaintiff made a series of turns, and ran a  
12 red light. At one point, plaintiff was traveling 50 miles per hour in a 25 mile per hour speed  
13 zone. Plaintiff was also driving down the middle of a narrow road.  
14

15  
16 Plaintiff pulled onto a dead end road and at the end of the road, he got out of his car and  
17 ran. Officer Butts continued the pursuit on foot. Plaintiff fell off a retaining wall at the side of  
18 the home located at 9709 Seeley Lake Drive. There was a GMC "JIMMY" SUV parked on the  
19 other side of the retaining wall. Plaintiff struck his head on the side mirror of the vehicle,  
20 breaking the mirror off the SUV. Plaintiff fell to the pavement. Officer Butts initially remained  
21 on top of the retaining wall and ordered plaintiff to lie on the ground with his hands behind his  
22 back.  
23

24 Plaintiff failed to comply with the officer's command and attempted to get up. Officer  
25 Butts deployed his Taser. The prongs from the Taser struck plaintiff in the lower back and left  
26 shoulder and discharged a five-second electrical burst. According to the Taser log, between

1 21:38:48 and 21:39:41 Officer Butts reactivated his Taser five additional times. Thus, there were  
2 six five-second bursts of electricity. In his report, Officer Butts indicates that the Taser was  
3 activated seven times.

4 Defendants and Plaintiff provide different explanations regarding the reason for the  
5 additional Taser bursts. Plaintiff states in his response that he complied with the officer's orders  
6 after the first Taser burst. (Dkt. # 41, page 3). Yet he also claims that the blow to his head from  
7 striking the SUV "impaired, dazed, and indicate [sic] his inability to comply with the officer's  
8 commands." (Dkt. # 41, page 4).

9  
10 Officer Butts swears in his affidavit that the reactivation of the Taser was because  
11 Plaintiff kept trying to get up or kept reaching to pull the Taser prongs out of his back and  
12 shoulder.

13  
14 In his affidavit, Officer Butts explains his reasons for deploying the Taser and why he  
15 chose to continue activating the Taser rather than trying another method to gain Plaintiff's  
16 compliance. He states:

17 Because I was alone and plaintiff was actively (physically) resisting and  
18 ignoring my verbal commands by attempting to stand and flee, I believed  
19 the Taser was the most effective way to maintain physical control over the  
20 plaintiff without escalating the situation by going "hands-on" with him or  
21 using other types of force. The other force options available to me at that  
22 time included using pepper spray or physical body force (punches and  
23 kicks). At that time, I did not believe pepper spray would have been  
24 effective, as plaintiff had already demonstrated that he was willing to try  
25 to flee at all costs and pepper spray does not inhibit the ability to stand and  
26 run. Also pepper spray requires the officer to get closer to the suspect in  
order to apply it. If plaintiff continued to resist arrest and I had to  
physically wrestle with him, the pepper spray could have physically  
affected me through contact with plaintiff. I did not believe going hands-  
on with plaintiff was a reasonable option, as plaintiff was physically  
extremely large and muscular. Also, it was very dark in the location of the  
arrest and I had not yet searched plaintiff for weapons. If I had moved in  
to handcuff him without his compliance and he was armed, it would have  
been very easy for him to use a weapon, like a knife on me. Additionally,

1 by going hands-on, I would be bringing my entire duty belt of weapons to  
2 within plaintiff's [sic] reach. If plaintiff got the upper hand, he would have  
3 been able to access my gun, Taser, asp baton (collapsible metal night  
4 stick), flashlight and pepper spray. Going hands-on without back-up  
5 officers on scene could have escalated the situation and resulted in grave  
6 injury to plaintiff and/or me. Taking all of those factors into account, I  
7 opted to use my Taser. The Taser allowed me to counteract plaintiff's  
8 physical resistance without inflicting any injury to plaintiff. While a  
9 person experiences temporary muscle disruption and discomfort while the  
10 Taser is cycling, the Taser does not inflict any long-term or lasting injury.  
11 The pain ends as soon as the five-second cycle ends. Additionally, the  
12 Taser allowed me to counteract plaintiff's resistance from a safe distance.  
13 Considering all of these factors, I opted to use the Taser and it worked.  
14 Once Officer Martin arrived on-scene and plaintiff complied, I ceased  
15 using the Taser and we were able to take plaintiff safely into custody.

16 (Dkt. # 34, affidavit of Officer Butts ¶ 9).

17 While taking Plaintiff into custody the officers detected an odor of intoxicants. Officer  
18 McClelland, who has special training in handling charges of "Driving-Under-the-Influence", was  
19 called to the scene.

20 Defendants maintain that Plaintiff was initially combative with medical personnel, but, at  
21 some point, he closed his eyes and became unresponsive. The defendants' contentions are  
22 partially corroborated by the deposition of the medical personnel who treated Plaintiff (Dkt. # 34,  
23 Exhibit A, deposition of David Marston). Mr. Marston states Plaintiff kept his eyes closed and  
24 was rigid, making it more difficult to place a "C" collar on him and place him on a backboard  
25 (Dkt. # 34, Exhibit A, deposition pages 13 and 14). Mr. Marston also states that after he was  
26 placed in the ambulance, Plaintiff pretended to become unresponsive. Mr. Marston concluded  
that Plaintiff was faking because Plaintiff was crying, and when they attempted to check his  
pupils he kept his eyes shut. An unconscious person does not cry and could not keep their eyes  
shut. Further, Plaintiff kept his body stiff, which an unconscious person would not do. Plaintiff  
allegedly interfered with their ability to obtain a blood pressure reading by stiffening his arm.

1           Officer McClelland advised Plaintiff of his right to refuse a blood draw and the  
2 consequences of exercising that right. Officer McClelland received no response and Plaintiff  
3 continued to act as if he were unconscious. Officer McClelland directed the medical personnel  
4 to draw blood. Medical personnel made it clear they would have drawn blood anyway for  
5 routine medical testing. Plaintiff's blood alcohol level was over the legal limit allowed by the  
6 State of Washington.  
7

8           Further, Plaintiff was driving while his license was suspended or revoked. Plaintiff was  
9 arrested for driving under the influence, (DUI), resisting arrest, driving while license suspended,  
10 and felony eluding. He later pled guilty to felony eluding and DUI (Dkt. # 33 and 34 Exhibits).  
11 The plea agreement is to an amended complaint in which and the government dropped the  
12 charges of resisting arrest and driving while license suspended. (Dkt. # 3, Exhibits).  
13

14           Plaintiff is unrepresented. In his "Motion Opposing Defendants' Motion for Summary  
15 Judgment", (DKT # 41), Plaintiff makes clear for the first time that he is attempting to challenge  
16 the legality of his DUI conviction in this civil rights action. (Dkt. # 41, pages 27 to 29).  
17

18           Although Plaintiff 's "Motion Opposing Defendants' Motion for Summary Judgment"  
19 contains a number of factual assertions regarding what occurred at the time of arrest, the  
20 "Motion" is not supported by sworn testimony, affidavits, or deposition testimony that sets forth  
21 the alleged facts contained in the "Motion." In short, Plaintiff has failed to present admissible  
22 evidence to contradict defendants' evidence.

### 23                               STANDARD OF REVIEW

24           Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment "if the  
25 pleadings, depositions, answers to interrogatories, and admissions on file, together with  
26 affidavits, if any, show that there is no genuine issue of material fact and that the moving party is

1 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56 (c). The moving party is entitled to  
2 judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an  
3 essential element of a claim on which the nonmoving party has the burden of proof. Celotex  
4 Corp. v. Catrett, 477 U.S. 317, 323 (1985).

5  
6 There is no genuine issue of fact for trial where the record, taken as a whole, could not  
7 lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith  
8 Radio Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant  
9 probative evidence, not simply “some metaphysical doubt.”). See also Fed. R. Civ. P. 56(e).  
10 Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting  
11 the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth.  
12 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T. W. Elec. Service Inc. v. Pacific  
13 Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

14  
15 The court must consider the substantive evidentiary burden that the nonmoving party  
16 must meet at trial, e.g. the preponderance of the evidence in most civil cases. Anderson, 477  
17 U.S. at 254; T.W. Elec. Service Inc., 809 F.2d at 630. The court must resolve any factual dispute  
18 or controversy in favor of the nonmoving party only when the facts specifically attested by the  
19 party contradict facts specifically attested by the moving party. Id. Conclusory, nonspecific  
20 statements in affidavits are not sufficient, and “missing facts” will not be “presumed.” Lujan v.  
21 National Wildlife Federation, 497 U.S. 871, 888-89 (1990).

## 22 DISCUSSION

23  
24 In the reply, Defendants ask the Court to strike the response because it was not mailed  
25 until July 20, 2009. This was three days late. The court declines to strike the brief as both the  
26 brief and a reply are before the Court. Defendants also note the brief is four pages over length.

1 The Court agrees that the response is four pages over length, but, the document is hand written  
2 and plaintiff is pro se. The pleading will be considered.

3 Defendants also argue several of Plaintiff's contentions must be stricken because they are  
4 unsupported by admissible evidence. These contentions are:

- 5 1. Plaintiff complied with Officer Butts' commands after the first Taser  
6 cycle. (Dkt.#41, p. 3, ¶ 2; p. 6, ¶ 2.)
- 7 2. Plaintiff responded verbally to Lakewood Fire personnel. (Id., p. 6, ¶ 3.)
- 8 3. The paramedics tried to check plaintiff's pupils, but plaintiff would not let  
9 them. (Id., p. 7, ¶ 1.) The paramedics knew that plaintiff was conscious  
10 and was not responding on purpose. (Id.)
- 11 4. Plaintiff suffers emotional distress, mental anguish, fear of needles, loss of  
12 Freedom, medical bills, disfigurement of the back, and loss of sacred body  
13 fluid. (Dkt. #41, p. 9, ¶ 2.)
- 14 5. Plaintiff "would not have been able to resist or evade by flight" due to the  
15 sequence of Taser cycles. (Dkt. #41, p. 15, ¶ 1.).

16 (Dkt. # 42). The contentions will not be stricken. Contemporaneous with this Report, the Court  
17 has requested that plaintiff submit additional materials to provide admissible evidence to support  
18 the contentions contained in his "Motion," which, if substantiated, may create an issue of fact on  
19 some of the matters that are the subject of defendants' motion for summary judgment. This court  
20 is interested in reaching the merits of this dispute and will not stand on procedure to dismiss a  
21 claim that may be the proper subject of a trial. At the same time, this court must have admissible  
22 evidence before determining what facts are truly at issue, if any. At the same time, defendants  
23 have raised certain issues that Plaintiff has not substantively disputed and appear ripe for  
24 adjudication. The following analyzes those issues.

25 A. The blood draw; defendants McClelland and Lakewood City (including  
26 the Lakewood Police Department).

Plaintiff attempts to impugn his DUI conviction by challenging the evidence that he had  
too high an alcohol level in his blood. The evidence was obtained by blood draw after the officer

1 sought Plaintiff's consent. Plaintiff refused to respond by pretending to be unconscious. Plaintiff  
2 claims this violated his Fourth Amendment right to privacy. Thus, he is collaterally challenging  
3 the evidence that supports his DUI conviction and a finding in his favor calls the validity of that  
4 conviction into question. This, the Court cannot do.

5  
6 When a person is challenging the very fact or duration of his physical imprisonment, and  
7 the relief he seeks is his immediate release or a speedier release from that imprisonment, his sole  
8 federal remedy is a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). In  
9 June 1994, the United States Supreme Court held that "[e]ven a prisoner who has fully exhausted  
10 available state remedies has no cause of action under § 1983 unless and until the conviction or  
11 sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas  
12 corpus." Heck v. Humphrey, 512 U.S. 477, 487 (1994). The court added:

13  
14 Under our analysis the statute of limitations poses no difficulty while the state  
15 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]  
§ 1983 cause of action for damages attributable to an unconstitutional conviction or  
sentence does not accrue until the conviction or sentence has been invalidated.

16 Id. at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be  
17 made based upon whether 'the nature of the challenge to the procedures [is] such as necessarily  
18 to imply the invalidity of the judgment.' *Id.* If the court concludes that the challenge would  
19 necessarily imply the invalidity of the judgment or continuing confinement, then the challenge  
20 must be brought as a petition for a writ of habeas corpus, not under § 1983." Butterfield v. Bail,  
21 120 F.3d 1023, 1024 (9th Cir.1997) (*quoting* Edwards v. Balisok, 520 U.S. 641 (1997)).

23 This is a § 1983 civil rights claim -- not a habeas corpus petition.  
24 Plaintiff's claims necessarily call into question the legality of his DUI conviction. Plaintiff's  
25 claims should be first raised in a petition for writ of habeas corpus, not a § 1983 civil rights claim  
26 for money damages. Significantly, Plaintiff has not successfully challenged the admissibility of



1 the blood draw or successfully overturned his DUI conviction, and therefore, a § 1983 action  
2 based on that blood draw will not be considered.

3 Since the only claim brought by Plaintiff against Defendants McClelland and the City of  
4 Lakewood is based on this allegedly improper blood draw, these two Defendants are entitled to  
5 Summary Judgment and DISMISSAL WITHOUT PREJUDICE.<sup>1</sup>  
6

7 B. Use of the Taser, the arrest of plaintiff: Defendant Butts.

8 Contemporaneously with the filing of this Report and Recommendation, this Court has  
9 ordered additional briefing on the motion for summary judgment on the claim regarding the use  
10 of the Taser and the conduct of Defendant Butts.

11 While defendants have supported their version of the events with significant and detailed  
12 affidavits, Plaintiff has not. Plaintiff, however, has included a number of factual assertions in his  
13 “Motion Opposing Defendants’ Motion for Summary Judgment” (Dkt #41), that, if supported by  
14 admissible evidence, may give rise to a factual issue justifying denial of summary judgment.  
15 While this court is not permitted to deny the motion for summary judgment without admissible  
16 evidence to support Plaintiff’s claim, this court should also give unrepresented parties every  
17 opportunity to present whatever evidence there may be to support their position before ruling on  
18 a summary judgment motion. Therefore, this court has re-noted this portion of defendants’  
19 motion for summary judgment to October 9, 2009.  
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## 22 CONCLUSION

23 For the reasons stated in this Report and Recommendation the Court recommends that the  
24 Motion for Summary Judgment be GRANTED IN PART. The claims against Defendants  
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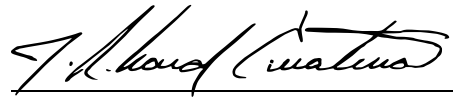
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26 <sup>1</sup> This court recommends dismissal WITHOUT PREJUDICE because it is conceivable that plaintiff may seek and obtain a writ of habeas corpus in the future regarding this blood draw, in which event, he may be entitled to review this claim.

1 McClelland and City of Lakewood (including the Lakewood Police Department) should be  
2 DISMISSED WITHOUT PREJUDICE. The remaining portion of the motion will be considered  
3 after the court receives the additional briefing.

4 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Fed. R. Civ. P., the parties shall  
5 have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.  
6  
7 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.  
8 Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the  
9 clerk is directed to set the matter for consideration on September 25, 2009, as noted in the  
10 caption.

11 Dated this 28<sup>th</sup> day of August 2009.

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15 J. Richard Creatura  
16 United States Magistrate Judge  
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